IN THE COURT OF APPEALS OF IOWA

No. 1-161 / 00-0488
Filed June 13, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

CHAD JEAN WILLIAMS,
Appellant.

Appeal from the Iowa District Court for Humboldt County, Kurt L. Wilke, Judge.

On appeal from his convictions and sentences for first-degree burglary, false imprisonment, and domestic abuse while displaying a dangerous weapon, the defendant alleges ineffective assistance of counsel and challenges suppression and evidentiary rulings, the sufficiency of the evidence on his burglary conviction, and the constitutionality of his sentence. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, and Derk Schwieger, County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

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VOGEL, P.J.

Chad Jean Williams appeals from the judgments and sentences entered upon his convictions for first-degree burglary, false imprisonment, and domestic abuse while displaying a dangerous weapon. Williams contends the district court erred in denying his motion to suppress the search of a gun case and resulting seizure of a shotgun and shells, and in admitting other crimes evidence. He also argues, in regard to his burglary conviction only, that the evidence was insufficient to support the conviction and that the twenty-five year sentence imposed was excessive and unconstitutional. The latter is raised as an ineffective assistance of counsel argument. Finally, he requests that an apparent controversy with his attorney and other alleged failures should be preserved for postconviction relief as ineffective assistance of counsel claims. We affirm.

Background Facts and Proceedings. Williams believed his wife, Kimberly, was having an affair, and Kimberly testified that an altercation over the issue on August 26, 1999, culminated with Williams hitting her several times in the face. As a result, charges were filed and a no-contact order was issued forbidding Williams to contact Kimberly and barring him from the family home in Humboldt County. Despite the order, over the next five days Williams and Kimberly had some contact, Kimberly asserting that at one meeting Williams again struck her in the face. It also appears that during this time Williams entered the home with Kimberly's consent on at least one occasion. However, accordingly to Kimberly, the final time Williams entered the residence was without her consent.

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Kimberly testified that Williams entered the house on September 2, 1999, at approximately 2:00 a.m., while Kimberly and the couples' four children were all asleep. She testified he began a prolonged argument over the alleged affair, repeatedly attempting to force an admission from her, during which he struck her once on the back. She further testified that several hours later, after the couple's three oldest children had gone to school, Williams took out and loaded a shotgun, which he then pointed at her head while making threatening statements.

The confrontation continued until 2:00 p.m., when Kimberly escaped the house through the utility room, leaving the youngest child, a fifteen-month-old son, behind with Williams. In a statement to police, Williams insisted he had been asleep when Kimberly entered the home with the youngest child. He admitted they did argue, but claimed he chased her only because he needed money from his billfold, which Kimberly had grabbed before running out of the house.

Christine Hendrix, a passing motorist, stopped when she saw Kimberly running up the street. She allowed Kimberly into the car and drove away with the intent of taking Kimberly to the hospital or the police station. Williams followed in a van and, after the vehicles had crossed into Kossuth County,[1] forced Hendrix to stop her car. Hendrix testified that Williams opened the car door, began punching Kimberly in the head, and then pulled her out of the car. Kimberly testified that Williams punched her in the nose, but Williams told police that

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[1] At issue in this appeal are only those convictions and sentences stemming from the incident in the marital residence, located in Humboldt County. Any actions by Williams or injuries to Kimberly occurring after that point are subject to a separate prosecution in Kossuth County and are not directly at issue in this appeal.

Kimberly had merely hit her nose on the car's doorpost. Williams pulled Kimberly back to the van and placed her inside. Kimberly was able to get back out of the van, by which time two other vehicles had stopped at the site and were preparing to call the police. Williams then left the scene.

Deputy Sheriff Michael Sankey was informed by dispatch of the highway confrontation and notified that a fifteen-month-old child was at the family home and it was possible "the suspect" or Williams was returning to the home to retrieve the child. Sankey drove to the Williams' home, his primary concern being the welfare of the child. Noting no other vehicles, he thought he had possibly arrived at the residence before Williams. He entered through the east door, which was unlocked, and noted that the back or south door was kicked in and ajar. Sankey began a quick search of the main floor and, when he looked into the main floor bedroom, saw a closed shotgun case lying on the bed. Sankey testified he opened the case in the interest of safety, to determine if it held a weapon, and if so to ascertain whether the weapon was loaded. He found the case contained an unloaded shotgun, one spent shell and one live shell.

Sometime after Deputy Sankey had left the bedroom, Deputy Sheriff Paul Samuelson arrived at the residence. Samuelson had also been advised that a child was in the house and the suspect was believed to be returning to the house. He was further informed that the intent of the suspect's return might be the commission of another assault. Sankey informed Samuelson that he had yet to find anyone in the residence, and cautioned him about the shotgun. Samuelson then used his dog to assist in conducting a search of the rest of the

house, but found no one present. Having been advised a weapon had been involved in the assault, Samuelson entered the bedroom and seized the gun, shells and case.

Scope of Review. A question as to the legality of a warrantless search or seizure and a claim of ineffective assistance of counsel are both constitutional challenges. As such we conduct a de novo review of the district court ruling, assessing its decision in light of the totality of the circumstances. *State v. Ortiz*, 618 N.W.2d 556, 558-59 (Iowa 2000); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). In contrast, an evidentiary ruling and a determination that a verdict is supported by sufficient evidence are each reviewed for correction of errors at law. Iowa R. App. P. 4

A court has wide discretion in making evidentiary rulings, and its decisions in this regard are reversed only for a demonstrated abuse of discretion. *See State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). A verdict will be binding on appeal so long as it is supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence is found when, viewing all the evidence in the light most favorable to the State, a rational trier of fact could be convinced of the defendant's guilt beyond a reasonable doubt. *Id.*

Suppression of the Shotgun, Case and Shells. Williams contends that the shotgun, case and shells were seized in violation of the Fourth Amendment protection against unreasonable and warrantless searches and seizures. U.S. Const. amend. IV; U.S. Const. amend. XIV, § 1. *See also* Iowa Const. art. I, § 8. It is uncontroverted that both officers entered the house with the intent of

searching for an abandoned fifteen-month-old child, the exigency of which provided a legitimate exception to the prohibition against warrantless searches and seizures. *See State v. Carlson*, 548 N.W.2d 138, 140-41 (Iowa 1996) (discussing the emergency-aid exception to the warrant requirement). Nor is there any serious controversy over whether Sankey inadvertently came across the shotgun case lying in plain view on the bed. *See generally State v. Chrisman*, 514 N.W.2d 57, 60 (Iowa 1994) (noting seizure of item in plain view is lawful where initial entry was justified and the incriminating nature of the item is immediately apparent). The true debate is over whether the officer had the right to open the shotgun case and determine its contents. If Sankey had no right to open the gun case, it calls into question Samuelson's later seizure of the gun, case and shells as evidence of the crime.

At the time Sankey entered the residence he was the only officer present. When he entered the bedroom he had yet to fully search the house and determine whether the child or anyone else was present. He was faced with the prospect that Williams was either already in the house or could return while he searched other portions of the house, giving Williams unregulated access to whatever was in the gun case. The opening was justified by Sankey's stated concerns over the safety of any individual who might be in the home, and the corresponding need to ascertain if the case contained a weapon that could be used against himself, the child, or another person. *See State v. Brecunier*, 564 N.W.2d 365, 368 (Iowa 1997) (citing *United States v. Vance*, 53 F.3d 220, 222 (8th Cir.1995) ("Exigent circumstances exist . . . when law enforcement officials

have a 'legitimate concern for the safety' of themselves or others."). Since the search was not unreasonable, suppression was not warranted.

Sufficiency of the Evidence to Support the Burglary Conviction. Williams bases his argument on the supposition that he cannot be convicted of burglarizing his own home. While acknowledging he was legally barred from the home by the no-contact order, he contends this bar cannot apply where there is evidence the protected party informally consented to a modification of the order. Williams contends the demonstrated acquiescence by Kimberly makes this case distinguishable from what would otherwise be the controlling holding of *State v. Peck*, 539 N.W.2d 170 (Iowa 1995).

In *Peck* the husband, while barred from the marital home under a no-contact order, entered the home and assaulted the wife's nephew. *Id.* at 172. Peck challenged the sufficiency of the evidence to support his burglary conviction, arguing that his ownership interest in the home gave him a "right, license or privilege" to enter the property. *Id.*[2] Rejecting that argument, the Iowa Supreme Court found even a person with a general right of entry could be convicted of burglary if entry at the time in question was beyond the person's current legal authority. *Id.* at 173. The court further noted the "[a]pplication of our

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[2] Iowa Code section 713.1 (1993) defined the crime of burglary as occurring when "[a]ny person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure . . . ." The language in the 1999 Iowa Code is unchanged.

burglary law in these circumstances will tend to discourage domestic violence and promote security in the home." *Id.*

Key to this decision was not consent to or refusal of entry, but the husband's lost rights under the parameters of the no-contact order. Just as Peck was prohibited from entering any premises occupied by his wife and children, Williams was prohibited from entering the marital residence. The authority to alter the terms of the order and grant Williams the necessary permission of entry lay exclusively with the district court, *see* Iowa Code § 236.5(2) (1999), and it is undisputed the no-contact order had not been amended by the district court and was in full force and effect on September 2. Thus Williams was legally barred from the home and had no current right, license or privilege to enter.

Although there was disputed evidence regarding Williams' understanding of his right or ability to enter the home, at best such evidence is relevant to Williams' mistake of fact defense. The evidence on consent was conflicting, Williams indicating Kimberly's total acquiesce, while the State provided evidence that Kimberly's consent was limited in nature and scope and did not extend to the night in question. When viewed in the light most favorable to the State, the record substantially supports a rational finding, beyond a reasonable doubt, that Williams did not posses a reasonable, good faith belief the no-contact order had been rescinded or modified.[3] As the record contains substantial evidence in

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[3] The jury was instructed as follows:

> The Defendant claims that at the time of the act in question, he was acting under a mistake of fact as to whether the no contact order was still in effect with respect to his permission or authority to enter the house.

support of the burglary conviction, we do not disturb the district court's ruling in this regard.

Admission of the Photographs. Williams contends the admission of three enlarged color photographs violates the rule against admitting evidence of prior wrongdoing to show the bad character of a defendant and a general propensity to act in conformity with that character. *See* Iowa R. Evid. 404(b). The photographs, taken immediately after the incident, show injuries Kimberly received prior to September 2, and injuries sustained in Kossuth County after she fled the house. Specifically, they depict facial bruising in various states of healing, an apparently fresh arm bruise, a small wound to the nose, and dried blood on the tip of the nose, on and under the nostril area, and on Kimberly's clothes. Other than the singular hit on the back testified to by Kimberly, which is not represented in the pictures, no physical injuries were alleged to have occurred in the parties' home.

Accordingly, the pictures do contain evidence of other wrongs or bad acts by Williams, and are admissible only if they are relevant to demonstrate certain legitimate factors of the State's case, such as intent and absence of mistake or accident. *See id.* Here, the district court found the photographs relevant to and

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> When an act is committed because of a mistake of fact, the mistake of fact must be because of a good faith reasonable belief by the Defendant, acting as a reasonably careful person under similar circumstances.
>
> The Defendant must inquire or determine what is true when to do so would be reasonable under the circumstances.
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> The State has the burden of proving the Defendant was not acting under a mistake of fact as it applies to the question of permission or authority to enter the house.

probative of those two issues. While not challenging this decision, Williams contends the probative value of the pictures is limited and that any such value is outweighed by the prejudicial effect created by the photographs' graphic nature.

All relevant evidence, even if otherwise admissible, can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403. Evidence will not be excluded merely because it tends to demonstrate a defendant's guilt. *State v. McDaniel*, 512 N.W.2d 305, 308 (Iowa 1994). To be unfairly prejudicial, evidence must create an undue tendency in the jury to make a decision on an improper, and often emotional, basis. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997). Here, the district court found the probative value was not outweighed by any prejudicial effect of the photographs, and we concur with that assessment.

In balancing these two factors we address four areas:

> (1) the actual need for the evidence in view of the issues and the other available evidence,
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> (2) the strength of the evidence showing the [other] bad acts were committed by the accused,
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> (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and
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> (4) the degree to which the jury will probably be roused by the evidence to overmastering hostility and use the evidence improperly.

State v. Query, 594 N.W.2d 438, 444 (Iowa Ct. App. 1999).

Although none of the depicted injuries were alleged to have occurred in the house, the prior injuries were strong evidence as to Williams' state of mind when he entered the home on September 2, corroborating the State's position

that he entered the home with the intent of committing a further act of domestic violence. The later injuries were also highly probative in determining the truth of what actually occurred in the couple's home in the immediately preceding hours, impacting the weight of the rest of the evidence offered in support of the charges. The actual need for the pictorial evidence was limited, as Kimberly testified to the details of the assaults and resulting injuries. This weakness is counterbalanced, however, by the relatively small likelihood the photographs would unduly impassion the jury, leading to improper use.

Juries are entitled to view a fair representation of the details relevant to the State's case. *See State v. Jones*, 511 N.W.2d 400, 406 (Iowa Ct. App. 1993). The fact that these photographs were in color is not a key factor in their admissibility. *See, e.g., State v. Armstrong*, 376 N.W.2d 635, 637 (Iowa Ct. App. 1985). Accurate yet disturbing photographs, such as the ones in this case, are not inadmissible just because they "invoke an emotional response." *State v. Astello*, 602 N.W.2d 190, 197 (Iowa Ct. App. 1999) (finding admissible photographs of "charred, decomposing, and maggot-infested remains"). The photographs of Kimberly "merely embellished the verbal picture of the events already provided by the testimony of the victim." *State v. Munz*, 355 N.W.2d 576, 580 (Iowa 1984). Given all the foregoing, we cannot say the district court abused its discretion when admitting the photographs, and affirm on this issue.

Ineffective Assistance of Counsel. Williams makes five allegations of ineffective assistance.

A. Attorney-client controversy. Williams claims a dispute over statements allegedly made by his trial attorney impacted his decision to abort plea proceedings. We preserve ineffective assistance of counsel claims for postconviction proceedings where the record on appeal is inadequate for the purpose of review. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa Ct. App. 1999). We preserve this claim for postconviction proceedings, as key to the disputed issue is any pertinent verbal exchanges between Williams and his attorney, which are necessarily absent from the record.

B. Failure to challenge constitutionality of sentence for burglary in the first degree. To establish ineffective assistance of counsel on the sentencing issue, Williams must demonstrate, by a preponderance of the evidence, that his attorney failed to perform an essential duty and that he was prejudiced as a result of this failure. *State v. Nucaro*, 614 N.W.2d 856, 858 (Iowa Ct. App. 2000). Williams alleges his attorney was ineffective in failing to challenge the constitutionality of the statutory provisions governing burglary in the first degree, which mandate a prison sentence not to exceed twenty-five years.[4] He claims the sentence violates the constitutional proscription against cruel and unusual punishment. *See* U.S. Const. amend. VIII; U.S. Const. amend. XIV; Iowa Const. art. I, § 17. We find this issue was preclusively determined in *State v. Rubino*, 602 N.W.2d 558 (Iowa 1999), which held

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[4] Iowa Code sections 713.3(2) & 902.9(2) combine to define burglary in the first degree as a B-class felony punishable by up to twenty-five years in prison. Iowa Code section 702.11 mandates that anyone convicted of burglary in the first degree has committed a forcible felony, which, pursuant to Iowa Code section 907.3, makes that person ineligible for a deferred or suspended sentence.

constitutional the legislative sentencing enhancement that occurs when an otherwise non-felonious assault underlies a burglary conviction. Counsel therefore breached no duty in failing to challenge the constitutionality of the sentence.

C. General allegations of ineffective assistance of counsel. Williams makes three additional claims relating to trial counsel's failure to depose the State's witnesses, failure to adequately cross-examine Kimberly, and failure to call certain potential defense witnesses. We find these three claims are too general to be preserved for postconviction proceedings. *See Astello,* 602 N.W.2d at 198-99 (declining to preserve general allegations that did not set forth the specifics of the alleged inadequacies or indicate how a different action would have changed the outcome of the case).

AFFIRMED.